Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JOSEPH H. DALBERTO,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The United States Of Pennsylvania, Middle District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the sentence imposed on Petitioner of a total of fifty four (54) months to one hundred eight (108) months violates the Eighth Amendment of U.S. Constitution in that it is grossly disproportionate to the crime committed (given the totality of circumstances) and whether the Pennsylvania Supreme Court's denial of Petitioner's Appeal contravenes the dictates of the Eighth Amendment prohibition against cruel and unusual punishment.

PARTIES

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STATEMENT OF GROUNDS OF JURISDICTION

Sought for Review are the Order of March 19, 1995 of the Pennsylvania Supreme Court, Middle District, denying Petition for Allowance of Appeal; Judgment of Pennsylvania Superior Court dated July 19, 1994 affirming lower Court's sentence; and Order dated August 2, 1994 denying Reargument/Reconsideration.

Jurisdiction is conferred by 28 U.S.C. Subsection 1254 ss. (1), and Supreme Court Rules, Rule 17(c).

UNITED STATES CONSTITUTION AMENDMENTS IN ISSUE

This case principally involves the provisions of the Eighth Amendment of the United States Constitution which provides, " . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

CONCISE STATEMENT OF THE CASE

Petitioner, Joseph H. Dalberto, was charged with 31 Counts of Criminal offenses, 26 of which involved

violation of the Controlled Substance, Drug, Devise and Cosmetic Act, 35 P.S. ss. 780-101 et seq., following a Sting operation involving a female informant who lured Petitioner to sell or give drugs to her in exchange for sexual favors.

A plea agreement was struck between the Commonwealth of Pennsylvania by the District Attorney's Office of Columbia County and Defendant represented by counsel. This plea agreement provided that Defendant would plead guilty to Eight (8) Counts of Delivery of a Controlled Substance, and that consecutive sentences would be imposed on no more than two Counts; the remaining Counts would be nolle prossed.

Following the guilty plea, a presentence report was ordered by the Court and the sentencing hearing date was scheduled and continued for five (5) times over more than one year span by the District Attorney. This delay was due to Petitioner's extensive cooperation with the Law Enforcement Authorities which successfully led to arrests and convictions of numerous offenders (See App. 6).

On September 9, 1993, Petitioner was finally sentenced before Judge Keller of Common Pleas Court. At sentencing, a presentence report was utilized which was more than one year old and did not contain any information about Petitioner's extensive cooperation with the authorities. The Court sentenced Petitioner to twenty seven (27) months to fifty four (54) months to Count 1, and twenty seven (27) months to fifty four (54) months to Count 2, running consecutive, with the remaining counts to run concurrent. This amounts to a total of fifty four

(54) months to one hundred eight (108) months of incarceration in a State Penitentiary, which falls squarely within the aggravated range of any one Count proposed in the Presentence Investigation.

Thereafter, Petitioner moved to the lower Court for Reconsideration and Modification of Sentence, which was denied on September 14, 1993. Petitioner then appealed to the Superior Court which affirmed the sentence. Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was also denied. (See App. 21)

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The issue of excessive and cruel and unusual punishment was first raised in Dalberto's Motion for Reconsideration/Modification of Sentence filed on September 10, 1993. Said issue also was presented in Petitioner's Appeal Brief to the Superior Court as well as Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

ARGUMENT

Whether the lower Court's Sentence of Petitioner for a total of fifty four (54) months to one hundred eight (108) months, including two consecutive sentences, violates the Eighth Amendment of the United States Constitution in that it does not fit the crime and it neglects mitigating circumstances, and it is disproportionate to the crime committed and whether the Pennsylvania Supreme

Court's denial of Petitioner's Appeal further deviates from the Eighth Amendment against cruel and unusual punishment as to require treatment by this Honorable United States Supreme Court?

The Eighth Amendment prohibition against cruel and unusual punishment, applies to convicted persons. *Mawby v. Ambroyer,* 568 F.Supp. 245 (1983). The term "cruel and unusual punishment" as used in the Eighth Amendment does not draw its meaning simply from the type of punishment or deprivation imposed, it is also intimately concerned with the "time" covered by the punishment. *Sweet v. South Carolina Dept. of Corrections,* 529 F.2d 854 (1975). Excessiveness is the hallmark of cruel and unusual punishment proscribed by the Eighth Amendment. *Davis v. Zahradnick,* 432 F.Supp. 444, rehearing denied, 102 S.Ct. 1742, 455 U.S. 1038 (1977).

In the instant case, Petitioner Dalberto was sentenced to two (2) consecutive sentences of twenty seven (27) months each on two Counts of drug offenses. Even though 2 consecutive sentences was not technically violative of the plea agreement a consecutive sentence should be imposed only if consistent with established rules of sentencing. According to case law, cumulative punishment, consistent with the double jeopardy clause, may only be imposed for acts constituting violations of two separate statutory provisions, as long as each provision requires proof of an additional fact which the other does not. *U.S. v. Caston,* 615 F.2d 1111, certiorari denied, 101 S.Ct. 99, 449 U.S. 831 (1980). *U.S. v. Mathis,* 579 F.2d 415 (1978).

Dalberto pled guilty to eight (8) Counts of the same charge: Delivery of a Controlled Substance. No two statutory provisions are involved and the facts surrounding each Count were identical. In fact all of the charges filed against Dalberto evolved from *one* sting operation, and were repetitive and cumulative always involving the same female informant and the same substance. Therefore, consecutive sentences are inappropriate and illegal in this case.

Moreover the lower Court at sentencing relied upon a presentence report that was more than one year old and that did not include the vital information about Dalberto's extensive cooperation with law enforcement authorities.

A sentence cannot be predicated on materially incorrect information or information so unreliable or untrustworthy that it would be unfair to proceed on basis of such evidence. *U.S. v. Baylin,* 535 F.Supp. 1145 (1982). A sentence may not be based on improper or inaccurate information. *U.S. v. Lemon,* 723 F.2d 922 (1983).

Due to the staleness and inaccuracy of the presentence report, Dalberto's sentence is unfair and must be overturned or modified.

Also, the sentencing Judge is required to consider all mitigating and aggravating circumstances involved though Pennsylvania law preserves that the Court has taken into consideration the content of a pre-sentence investigation report, that report was woefully outdated and incomplete. *U.S. v. Lopez-Gonzales,* 688 F.2d 1275 (1982); *U.S. v. Roper,* 681 F.2d 1354, certiorari denied (1982). For the determination of sentence, justice requires

consideration of more than the particular act by which the crime was committed, but that there be taken into account all of the characteristics and propensities of Defendant. *Geraghty v. U.S. Parole Commission,* 579 F.2d 238, certiorari granted, 99 S.Ct. 1420, 440 U.S. 945 (1978).

In this case, after arrest, Dalberto fully cooperated with law enforcement authorities, including, BATF, BCI, PA Drug Strike Force, PA State Police, South Centre Township Police, DEA and FBI. He also became an informant and helped effect numerous arrests and convictions. His efforts are documented in Narcotic Agent Robert Mattis letter to the Sentencing Judge (see appendix), which was presented at sentencing, but not commented on by the Sentencing Court.

Though concededly each sentence is within the mitigated range, to run them consecutively places the aggregate sentence in the aggravated range per offense. Such manipulation makes for a sentence grossly disproportionate between punishment and the crime as prohibited by the Eighth Amendment of the Constitution. *U.S. v. Kaiser,* 545 F.2d 467 (1977). *Williams v. Johnson,* 845 F.2d 906 (1988). The Eighth Amendment must draw its meaning from the evolving standards of decency which mark the progress of a maturing society *Gregg v. Georgia,* 965 S.Ct. 2909 (1976). The Eighth Amendment has been interpreted in a flexible and dynamic manner. *Gregg,* Supra.

In modern America, involvement with controlled substances has become a rampant problem. One progressive method of helping drug offenders repent and reduce punishment is for them to be involved with law enforcement. This is exactly what Dalberto did. Such cooperation

must be considered amongst the most critical of mitigating circumstances. Further, the prosecution should not be encouraged to participate in repeat sting operation set-up transactions to frustrate this mitigation.

When considering the Eighth Amendment claim, the fact finder must consider totality of circumstances surrounding punishment. *Rodgers v. Thomas*, 879 F.2d 380 (1989). In the instant case, the presentence report is outdated and inaccurate; strong mitigating circumstances involving Dalberto's cooperation were ignored which resulted in a sentence in the aggravated range. The most important is that, Dalberto, through his conduct of cooperation has proven his repentancy thus a severe and lengthy penalty is an infliction without penological justification, and thus is unnecessary and disproportionate to the crime committed. *Murray v. Novak*, 645 F.Supp. 883 (1986). Therefore, the totality of circumstances of the case indicate that the sentence violates the cruel and unusual punishment clause of the Eighth Amendment and must be nullified or modified.

Respectfully submitted,

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COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs	:	No. 03239
JOSEPH H. DALBERTO, Appellant	:	Philadelphia 1993

Appeal from the Judgment of Sentence September 9, 1993 in the Court of Common Pleas of Columbia County, Criminal Nos. 428 & 429 of 1991

(Filed Jul. 19, 1994)

BEFORE: CIRILLO, JOHNSON and CERCONE, JJ.

OPINION BY CIRILLO, J.:

Joseph H. Dalberto appeals from a judgment of sentence entered in the Court of Common Pleas of Columbia County. We affirm.

Following a lengthy sting operation, Dalberto was arrested and charged with a total of thirty-one (31) counts of criminal activity, twenty-six (26) of which included violations of the Controlled Substance, Drug, Device and Cosmetic Act. 35 P.S. § 780-101 *et seq.* Dalberto entered a guilty plea to eight (8) counts of delivery of a controlled substance, with a plea bargain contemplating that consecutive sentences would be imposed on no more than two counts; the remaining counts would run concurrent.[1]

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[1] When counsel for both sides arrive at a plea agreement, they are required to state the agreement on the record in open court. *See* Pa.R.Crim.P. 319(b)(2). Here, Dalberto's written, detailed guilty plea, which fully and correctly informed him of the consequences of his plea, included the following: Terms of plea agreement, if any: "No more than 2 counts consecutive."

A pre-sentence investigation was completed, and Dalberto was sentenced to twenty-seven (27) to fifty-four (54) months imprisonment on count one, and twenty-seven (27) to fifty-four (54) months imprisonment on count two, to run consecutively. The sentence imposed on the remaining six counts, in accordance with the plea agreement, ran concurrent to count one of the sentence. Thus, the aggregate period of incarceration imposed upon Dalberto was fifty-four (54) to one hundred eight (108) months.

Dalberto filed a petition to modify sentence, alleging that the sentence imposed was "excessive and unjust." The petition was dismissed without a hearing. This appeal followed.

Dalberto raises the following issues for our consideration:

> (1) Whether the trial court abused its discretion in imposing a sentence of imprisonment spanning fifty-four (54) to one hundred eight

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The plea was signed and initialed by Dalberto. Additionally, the trial judge conducted an oral guilty plea colloquy. When the trial judge asked if there were any plea negotiations regarding sentencing, the defense attorney announced that "[t]he arrangement would be no more than 26 – the sentences of the deliver count on the sentences would run consecutive, the rest concurrent sentences." While this response is, at best, confusing, we will acknowledge the plea agreement as it is set forth in both parties' briefs and the written guilty plea agreement. Since there is no dispute as to the actual terms of the plea agreement, we will overlook the fact that it has not been clearly stated on the record. *See Commonwealth v. Walburn*, 249 Pa. Super. 460, 378 A.2d 387 (1977) (failure to place terms of plea agreement on the record does not necessarily lead to grant of new trial).

(108) months, when it failed to consider the significant mitigating circumstances presented by Dalberto's extensive post-arrest cooperation with law enforcement authorities, the particular circumstances of the offense, and the rehabilitative needs of the defendant?

(2) Where the pre-sentence investigation report was prepared in excess of one year prior to sentencing, must the sentence imposed by the trial court be vacated?

(3) Must the sentencing court's judgment be vacated for failure to grant a hearing on Dalberto's motion for reconsideration of sentence, summarily dismissing the same?

Dalberto's primary argument implicates the discretionary aspects of sentencing. At first blush, it appears as though Dalberto has waived the opportunity to present this challenge. It is firmly established that a plea of guilty generally amounts to a waiver of all defects and defenses except those concerning the jurisdiction of the court, the *legality* of sentence, and the validity of the guilty plea. *Commonwealth v. Moyer,* 497 Pa. 643, 444 A.2d 101 (1982); *Commonwealth v. Unger,* 494 Pa. 592, 432 A.2d 146 (1980); *Commonwealth v. Montgomery,* 485 Pa. 110, 401 A.2d 318 (1979); *Commonwealth v. Reichle,* 401 Pa. Super. 1, 589 A.2d 1140 (1991); *Commonwealth v. Coles,* 365 Pa. Super. 562, 530 A.2d 453 (1987). Here, Dalberto does not pose a challenge to the legality of his sentence; under the facts of this case, however, Dalberto will not be precluded from appealing the discretionary aspects of his sentence. Our review of current Pennsylvania case law indicates that the determination of whether discretionary aspects of sentencing may be challenged after a guilty plea is entered depends

upon the actual terms of the plea bargain, specifically, to what degree a sentence agreement has been reached. The facts of this case present an opportunity for further clarification of the consequences of entering into a negotiated plea, as opposed to an open plea. Accordingly, we devote the first portion of this opinion to an explanation of the effects of plea bargaining[2] on subsequent challenges to sentencing.

Pennsylvania has long recognized plea bargaining and plea negotiations as a just method of disposition in criminal cases. *See Commonwealth v. Wilkins*, 442 Pa. 524, 277 A.2d 341 (1971); *Commonwealth v. Alvarado*, 442 Pa. 516, 276 A.2d 526 (1971); *Commonwealth ex rel. Kerekes v. Maroney*, 423 Pa. 337, 223 A.2d 699 (1966); *see also* Pa.R.Crim.P. 319(b).[3] "[P]lea bargaining is a vital aide

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[2] Plea bargaining, as defined in Black's Law Dictionary, is

> [t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.

Black's Law Dictionary 1037 (5th ed. 1979).

[3] Rule 319. Pleas and Plea Agreements

* * *

> (b) Plea Agreements.
>
> (1) The trial judge shall not participate in the plea negotiations preceding an agreement.
>
> (2) When counsel for both sides have arrived at a plea agreement they shall state on the record in open court, in the presence of the defendant, the terms of the agreement. Thereupon the judge shall conduct an inquiry of the defendant on the record to determine

[sic] to the effectuation of criminal justice." *Commonwealth v. McKee*, 226 Pa. Super. 196, ___, 313 A.2d 287, 288 (1973). In the interest of understanding the consequences of the plea bargaining process, there must be a clear distinction made between an "open plea" and a "negotiated plea." For a defendant challenging the discretionary aspects of his or her sentence after entering a guilty plea, this distinction is crucial in determining whether or not an appeal from such a sentence will stand.

In *Commonwealth v. Coles*, 365 Pa. Super. 562, 530 A.2d 453 (1987), this court examined the consequences of entering into a strictly negotiated plea agreement. The appellee in *Coles* entered guilty pleas to theft charges and, as part of the plea negotiations, the Commonwealth recommended a sentence of imprisonment of not less than two and one-half years, less one day, to not more than five years, less one day, each sentence to run concurrently. The trial judge imposed the recommended sentence. Appellee filed a motion to reconsider the sentence and, following a hearing on the matter, the trial court entered an order reducing appellee's sentence. The trial court denied the Commonwealth's motion to vacate the order and the Commonwealth appealed. The issue presented to this court was whether the trial court was

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whether he understands and concurs in the agreement.

(3) If the judge is satisfied that the plea is understandingly and voluntarily tendered, he may accept the plea. If thereafter the judge decides not to concur in the plea agreement, he shall permit the defendant to withdraw his plea.

Pa.R.Crim.P. 319(b)

prevented from modifying the sentence, since the sentence was a result of plea bargaining negotiations.

Finding that the Commonwealth and the appellee had bargained for a *specific sentence,* we decided that the appellee had "attempted to strip the Commonwealth of the 'benefit of the bargain' when he petitioned the judge to unilaterally set aside the bargain." *Id.* at ___, 530 A.2d at 456.

> This was an inappropriate proceeding as by negotiating the sentence accepted by the court, the sentence could not be altered in the absence of mistake, misrepresentation or illegality. To hold otherwise would make a sham of the negotiated plea process and would give the defendant a second bite at his sentence, which we have frequently deplored in the context of withdrawal of a guilty plea.

Id. Importantly, in discussing the appellee's motion to modify sentence, the court stated,

> where a plea agreement is an *open one* as opposed to one for a negotiated sentence, unquestionably, after sentencing the defendant can properly request reconsideration as the court alone decided the sentence *and no bargain for a stated term, agreed upon by the parties, is involved.*

Id. at ___, 530 A.2d at 457 (emphasis added).

Finding the order modifying the sentence to have been in error, the court concluded that

> [i]f either party to a negotiated plea agreement believed the other side could, at any time following entry of sentence, approach the judge

> and have the sentence unilaterally altered, neither the Commonwealth nor any defendant would be willing to enter into such an agreement.

Id. at ___, 530 A.2d at 458.

Shortly after *Coles* was decided, this court in *Commonwealth v. Becker*, 383 Pa. Super. 553, 557 A.2d 390 (1989) suggested a similar approach to negotiated guilty pleas in the context of challenges to the discretionary aspects of sentencing. There, appellant entered a guilty plea to a drunk driving charge, and the trial court sentenced him to the shortest sentence permissible under the mandatory sentencing provisions of the Vehicle Code. Appellant filed a motion to withdraw his guilty plea and also sought modification of his sentence. On appeal, this court found no basis for the withdrawal of the guilty plea. While indicating that a defendant does not waive the right to appeal the legality of sentence upon entry of a guilty plea, this court expressed the following in a footnote:

> Though it has often been stated casually that a person who pleads guilty may only challenge the legality of sentence, this is not strictly true. *A defendant, who enters a guilty plea which does not involve a plea bargain designating the sentence to be imposed, cannot be said to have granted the sentencing court carte blanche to impose a discriminatory, vindictive or excessive sentence so long as the legal limits are not exceeded.* Obviously, the entry of a guilty plea does not preclude a petition for allowance of appeal of discretionary aspects of sentence subsequently imposed. *See*[,] *e.g.*[,] *Commonwealth v. Sanchez*, 372 Pa. Super. 369, 539 A.2d 840 (1988) (appeal of discretionary aspects

of sentence following entry of a guilty plea); *Commonwealth v. Krum*, 367 Pa. Super. 511, 533 A.2d 134 (1987) (same).

Becker, 383 Pa. Super. at ___ n.1, 557 A.2d at 392 n.1 (1989) (emphasis added).

More recently, in *Commonwealth v. Reichle*, 404 Pa. Super. 1, 589 A.2d 1140 (1991), it was determined that the appellant had waived the right to appeal the discretionary aspects of her sentence where the plea agreement contained a negotiated sentence. Appellant was charged with two counts of driving under the influence of alcohol (DUI), and entered a plea to one DUI count in exchange for the Commonwealth's agreement to *nol pros* the remaining charge and recommend the mandatory minimum sentence of 48 hours incarceration. The sentencing court accepted the plea agreement and sentenced appellant to 48 hours imprisonment and 50 hours of community service. A motion to modify sentence was filed and denied. On appeal, appellant challenged the discretionary aspects of her sentence.

In deciding whether to allow appellant's appeal, the court initially pointed out that the Commonwealth and Reichle had bargained for a particular sentence, and that appellant received precisely what she was promised under the terms of the agreement. *Id.* at ___, 589 A.2d at 1141. Considering the specific terms of the negotiated sentence, this court pronounced, "Where the plea agreement contains a *negotiated sentence* which is accepted and imposed by the sentencing court, there is no authority to permit a challenge to the discretionary aspects of that sentence." *Id.* (emphasis added). The court went on to cite

Coles, supra, for the proposition that permitting a discretionary appeal following the entry of a negotiated plea would make a sham of the negotiated plea process. Ultimately, the court dismissed the appeal.

Coles and *Reichle* clearly indicate that where there are specific penalties outlined in the plea agreement, an appeal from a discretionary sentence will not stand. Consistent with this reasoning, the *Becker* decision implies that where there have been no sentencing restrictions in a plea agreement, the entry of a guilty plea will not preclude a challenge to the discretionary aspects of sentencing. Otherwise stated, the plea agreements in *Coles* and *Reichle* represented "negotiated pleas," while *Becker* referred to an "open plea."

> In an open plea agreement, there is an agreement as to the charges to be brought, but no agreement at all to restrict the prosecution's right to seek the maximum sentences applicable to those charges. At the other end of the negotiated plea agreement continuum, a plea agreement may specify not only the charges to be brought, but also the specific penalties to be imposed.

Commonwealth v. Porreca, 389 Pa. Super. 553, ___, 567 A.2d 1044, 1047 (1989), *rev'd on other grounds in* 528 Pa. 46, 595 A.2d 23 (1991).[4]

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[4] The Pennsylvania Supreme Court in *Porreca* determined that, since there was no inquiry into whether the defendant's plea was induced by an unfulfilled promise or threat, reversal was necessary so that the case could be remanded for a new guilty plea colloquy. Thus, the grounds for reversal did not affect the above quoted language describing the plea bargain continuum.

With these standards in mind, it becomes clear that Dalberto's plea agreement falls somewhere between a negotiated plea and an open plea; our task is to determine the effect of this hybrid plea agreement on the right to challenge the discretionary aspects of his sentence. Here, while Dalberto's plea agreement did not include a specific term of imprisonment, it did place limitations on his sentence, *i.e.* that no more than two of the charges were to run consecutively. We believe that justice requires that we treat this case as an "open" plea and permit an appeal to the discretionary aspects of sentencing. Thus, we conclude that a plea agreement which recommends that consecutive sentences be imposed, standing alone, will not prevent a subsequent challenge to the discretionary aspects of that sentence. We wish to make clear, however, that we will allow an appeal only as to those discretionary aspects of sentencing which have not been agreed upon during the negotiation process. Thus, Dalberto's appeal shall not include an appeal to the consecutive nature of his sentence; this aspect of his sentence has been previously agreed upon. Nevertheless, there exists the potential for a trial court to abuse its sentencing discretion in Dalberto's situation; the duration of the sentence has not been agreed upon, but is left to the judgment of the trial court. The specific duration of the sentence, therefore, may be challenged. By contrast, in a "negotiated" plea agreement, where a sentence of specific duration has been made part of a plea bargain, it would clearly make a sham of the negotiated plea process for courts to allow defendants to later challenge their sentence; this would, in effect, give defendants a second bite at the sentencing process. *Coles, supra.*

The case at hand is, of course, different from the situation where a defendant's attorney, as part of the plea bargain, agrees to recommend a certain sentence, and the trial court then refuses to abide by the recommendation and imposes a sentence greater than the one on which the defendant and the Commonwealth had agreed. In those instances, while challenges to the sentence themselves have been permitted, "[s]uch a claim is not, strictly speaking, a challenge to the excessiveness of the sentence; rather, it is properly addressed to the validity of the appellant's plea." *Commonwealth v. Osteen*, 381 Pa. Super. 120, 552 A.2d 1124 (1989). *See Commonwealth v. McClendon*, 403 Pa. Super. 467, 589 A.2d 706 (1991) (en banc) (plea bargain was limited to what sentence the prosecutor would recommend, not what sentence the court would actually impose, thus, when the prosecutor informed the trial court that the Commonwealth would have no objection to the imposition of concurrent sentences and the judge imposed consecutive sentences, appellant's motion to withdraw his guilty plea and motion to reduce sentence were denied); *Osteen, supra* (trial court specifically rejected Commonwealth's recommendation, which induced appellant's plea, for a term of probation and instead sentenced appellant to a term of imprisonment; appellant filed only a motion to reconsider sentence, whereby the Superior Court addressed the motion as a challenge to both the validity of the guilty plea and excessiveness of sentence, and denied both. Again, the plea bargain was limited to what sentence the prosecutor would recommend); *see also Commonwealth v. Porreca*, 528 Pa. 46, 595 A.2d 23 (1991).

Here, Dalberto does not challenge the validity of his plea, rather, he contends that his sentence was excessive. Since we have determined that the term of his plea was not negotiated, and that he has not waived his right to bring such an appeal, we now address Dalberto's issue implicating the discretionary aspects of his sentence. "In a challenge to the discretionary aspects of sentence, the appellant must invoke this court's jurisdiction by including in his or her brief a separate concise statement demonstrating that there exists a substantial question as to the appropriateness of the sentence under the Sentencing Code." *Commonwealth v. Wright*, 411 Pa. Super. 111, ___, 600 A.2d 1289, ___ (1991); *see Commonwealth v. Tuladziecki*, 513 Pa. 508, 511-13, 522 A.2d 17, 19 (1987); Pa.R.A.P. 2119(f).[5] Here, Dalberto has included a 2119(f) statement of the reasons for his appeal. We now turn our attention to whether it has presented a "substantial question."

The legislature of this Commonwealth has vested broad discretion in the trial court to impose an appropriate sentence in each case that comes before it. *Tuladziecki, supra.* It is only where an aggrieved party can articulate clear reasons why the sentence issued by the trial court

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[5] Pennsylvania Rule of Appellate Procedure 2119(f) provides:

> (f) Discretionary Aspects of Sentence. An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Pa.R.A.P. 2119(f).

compromises the sentencing scheme as a whole that we will find a "substantial question" and review the decision of the trial court. *Id.* Specifically, "[w]e are inclined to find the presence of a substantial question where appellant advances a colorable argument that the trial judge's actions were either inconsistent with the specific provisions of the Sentencing Code, or contrary to the norms which underlie the sentencing process." *Commonwealth v. Zelinski*, 392 Pa. Super. 489, 499-500, 573 A.2d 569, 574 (1990). Dalberto has presented no arguments that the imposed sentence violated any specific provision of the Sentencing Code and, further, has not specified any particular deviation from the fundamental norms underlying the sentencing process.

Dalberto questions the appropriateness of the consecutive sentences[6] and contends that the trial court failed to consider or mention significant mitigating circumstances, including: Dalberto's cooperation with law enforcement authorities; the particular circumstances of the commission of the offenses; the repeat nature of the crimes; and Dalberto's rehabilitative needs. The imposition of a concurrent or consecutive sentence is discretionary. *Commonwealth v. Wienckowski*, 371 Pa. Super. 153, 537 A.2d 866 (1988). We will not, as stated above, allow a challenge to the consecutive nature of Dalberto's sentence, as this portion of the sentence has been previously agreed upon.

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[6] Particularly, Dalberto concedes that while the trial court imposed sentences on each count within the mitigated range, the net effect of making counts one and two consecutive resulted in a minimum imprisonment period of 54 months, placing the sentence in the aggravated range of the sentencing guidelines.

This notwithstanding, Dalberto received precisely what he was promised under the open plea agreement. Additionally, we have repeatedly held that the mere assertion that the trial court failed to give adequate weight to sentencing factors will not rise to the level of a "substantial question." *Commonwealth v. Minott*, 395 Pa. Super. 552, 577 A.2d 928 (1990) (no substantial question is raised where appellant challenges the discretion of the court in "overemphasizing" or "failing to adequately consider" certain factors); *Commonwealth v. Williams*, 386 Pa. Super. 322, 562 A.2d 1385 (1989) (same); *Osteen, supra* (no substantial question presented where appeal merely challenges the weight given various sentencing factors by the trial court). It is clear that Dalberto is simply asking this court to reweigh the mitigating circumstances presented at sentencing and in the pre-sentence report. In light of the foregoing standards, we decline to do so. Dalberto has not presented a substantial question as to the appropriateness of his sentence.

Moreover,

> [w]here pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors. A pre-sentence report constitutes the record and speaks for itself. . . . Having been fully informed by the pre-sentence report, the sentencing court's discretion should not be disturbed.

Commonwealth v. Devers, 519 Pa. 88, ___, 546 A.2d 12, 18 (1988). Here, the trial judge had the benefit of a pre-

sentence report. While the fact that Dalberto cooperated with various law enforcement agencies after his plea was entered was not made part of the pre-sentence report, the record reflects that the trial judge had the benefit of this knowledge during sentencing. Accordingly, Dalberto was sentenced in the lowest mitigated range permitted by the sentencing guidelines. Dalberto has presented no substantial question for our review; furthermore, the trial judge was in possession of a pre-sentence report. Because Dalberto has failed to invoke this court's jurisdiction, *Tuladziecki, supra,* we decline to address the merits of his sentencing issue.

In his second issue, Dalberto claims that his sentence must be vacated because the pre-sentence report relied upon by the trial court was prepared in excess of one year prior to the actual imposition of sentence. Dalberto concedes that there exists no appellate case law in support of his proposition. Dalberto baldly asserts that because the trial court based its sentence principally on the information provided in the pre-sentence report, the unrevised report became a "fatal flaw" in the sentencing process. We disagree. The sentencing transcript reveals that Dalberto and his counsel were provided with the pre-sentence investigation report and were permitted to review the report and comment on whether there were any errors or omissions:

BY THE COURT:

Q. Mr. Dalberto, have you had an opportunity to read and review the pre-sentence report?

A. Yes.

Q. Is there anything you wish to state before the sentence is imposed?

A. Yes, I have been drug free for the past two years, and I have been gainfully employed for the last two years without missing a day's work. And, I realize the mistake I have made and tried to help correct it by cooperating.

Q. Is that all you have to say?

A. Yes.

Additionally, as stated above, the trial court was made aware, by both the defense and the Commonwealth, of Dalberto's cooperation with various law enforcement agencies. Dalberto was given ample opportunity to amend/challenge his pre-sentence report. We, therefore, will not disturb the trial court's sentence on the mere assertion that that the pre-sentence report was "stale."

Finally, Dalberto asserts that his sentence should be vacated for failure to grant a hearing on the motion for reconsideration of sentence. We disagree.

> A petition for modification of sentence is designed to give the sentencing court an opportunity, before appellate review is undertaken, to correct any errors it may have committed at sentencing. . . . A modification of sentence hearing, therefore, is only necessary if the sentencing record discloses errors by the trial court. Should the modification petition fail to raise such errors, then the trial court is under no obligation to hold an obviously frivolous hearing. . . . It is within the trial court's discretion to rely upon the sentencing record.

Commonwealth v. Ziomek, 291 Pa. Super. 251, ___, 435 A.2d 894, 896 (1981) (citations omitted).

In his appellate brief, Dalberto states that, "in the spirit of *Ziomek* . . . a hearing was necessitated in that the [modification] [p]etition raised a significant error." Specifically, Dalberto points to paragraph eight of his modification petition, which reveals a challenge to the consecutive nature of his sentencing. For reasons set forth previously in this opinion, it is readily apparent that the trial court committed no error in this regard. Accordingly, the trial court was under no obligation to hold a hearing on Dalberto's motion.

Judgment of sentence affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs	:	No. 03239
JOSEPH H. DALBERTO, Appellant	:	Philadelphia 1993

Appeal from the Judgment of Sentence September 9, 1993 in the Court of Common Pleas of Columbia County, Criminal Nos. 428 & 429 of 1991

BEFORE: CIRILLO, JOHNSON and CERCONE, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of COLUMBIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ David A. illegible
PROTHONOTARY

Dated: JULY 19, 1994

J. A17031/94

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 03239 Philadelphia 1993
JOSEPH H. DALBERTO,	:	

ORDER

The court hereby denies the application filed August 2, 1994, requesting reargument/reconsideration of the decision dated July 19, 1994.

Per Curiam
PER CURIAM

DATE: September 27, 1994

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF
VS	:	THE 26TH JUDICIAL DISTRICT
JOSEPH HARRY DALBERTO	:	COLUMBIA COUNTY
Defendant	:	BRANCH, PA
	:	CRIMINAL DIVISION
	:	NO. 428 of 1991
	:	429 of 1991
	:	

WILLIAM S. KREISHER, ESQUIRE, Attorney for the Commonwealth
MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant

ORDER

(Filed Sep. 16, 1993)

AND NOW this 14th day of September, 1993, Petitioner's Motion for Reconsideration/Modification of Sentence is hereby denied without hearing.

BY THE COURT

/s/ Gailey C. Keller
HONORABLE GAILEY C. KELLER, P.J.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	**No. 519 Middle District Allocatur Docket 1994**
Respondent	:	
v.	:	
JOSEPH H. DALBERTO,	:	**Petition for Allowance of Appeal from Superior**
Petitioner	:	**Court**

ORDER

PER CURIAM:

AND NOW, this 10th day of March, 1995, the Petition for Allowance of Appeal is denied.

Mr. Justice Montemuro is sitting by designation.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT COLUMBIA COUNTY BRANCH, PENNA CRIMINAL DIVISION NOS. 428 OF 1991 AND 429 OF 1991 OTN: C-513863-0 OTN: C-267181-5
vs.	:	
JOSEPH H. DALBERTO,	:	

NOTICE OF APPEAL

(Filed Oct. 4, 1993)

Notice is hereby given that JOSEPH H. DALBERTO, Defendant herein, hereby appeals to the Superior Court of Pennsylvania from the Sentencing Orders of the Honorable Judge Gailey C. Keller entered in this matter on the 9th day of September, 1993 and the Order of Court dated September 14, 1993, denying "Petitioner's Motion for Reconsideration/Modification of Sentence".

/s/ Michael R. Lynn
MICHAEL R. LYNN, ESQUIRE
Attorney for Defendant
115 Iron Street
Bloomsburg, PA 17815
(717) 784-3701
I.D. #26105

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION
VS.	:	
JOSEPH H. DALBERTO	:	
OTN C 513863-0	:	
	:	
	:	
	:	NO. 428 of 1991
	:	CHARGE: Delivery of Controlled Substance (Count One)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION
VS.	:	
JOSEPH H. DALBERTO	:	
OTN C 513863-0	:	
	:	NO. 428 of 1991
	:	CHARGE: Delivery of Controlled Substance (Count Two)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run consecutive to the sentence imposed to Count One.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION
VS.	:	
JOSEPH H. DALBERTO	:	
OTN C 513863-0	:	
	:	NO. 428 of 1991
	:	CHARGE: Delivery of Controlled Substance (Count three)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 513863-0	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 428 of 1991 CHARGE: Delivery of Controlled Substance (Count Four)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 513863-0	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 428 of 1991 CHARGE: Delivery of Controlled Substance (Count Five)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 513863-0	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 428 of 1991 CHARGE: Delivery of Controlled Substance (Count Six)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed in Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 513863-0	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 428 of 1991 CHARGE: Delivery of Controlled Substance (Count Seven)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 513863-0	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 428 of 1991 CHARGE: Delivery of Controlled Substance (Count Eight)

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 13, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA VS. JOSEPH H. DALBERTO OTN C 267181-5	:	IN THE COURT OF COMMON PLEAS OF THE 26TH JUDICIAL DISTRICT OF PENNSYLVANIA COLUMBIA COUNTY BRANCH CRIMINAL DIVISION NO. 429 of 1991 CHARGE: Delivery of Controlled Substance

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

SENTENCE

(Filed Sep. 14, 1993)

AND NOW, to wit, this 9th day of September, 1993, the Court sentences the Defendant to pay the costs of prosecution and to undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) months, nor more than fifty-four (54) months, with sentence to run concurrent to the sentences imposed to Counts One and Two.

BY THE COURT,

/s/ Gailey C. Keller P.J.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

ERNEST D. PREATE, Jr.
ATTORNEY GENERAL

Reply To:

Robert J. Mattis, Narcotics
Agent II
Bureau of Narcotics
Investigations
& Drug Control
667 N. River St., Cross Valley
Centre
Wilkes-Barre, PA 18705
Telephone # 717-826-2051

September 7, 1993

RE: Commonwealth v.
Dalberto
No. 428-91 & 429-91

Gailey C. Keller
President Judge
Columbia County
Courthouse, Main St.
Bloomsburg, PA 17815

Dear Sir:

In regard to the above referenced defendant pending sentencing before your Honor, this agent arrested DALBERTO on October 4, 1991 after a buy-bust in Berwick. DALBERTO was additionally charged with multiple deliveries of cocaine occurring between May and October of 1991. On January 7, 1992 this agent interviewed DALBERTO after DALBERTO volunteered to provide information and assistance in targeting drug law violators in Columbia, Luzerne, Berks, and Dauphin

counties. No promises were made to DALBERTO other than the extent of his cooperation would be made known to the District Attorney's office and the sentencing judge. DALBERTO subsequently became a confidential police informant.

During the past eighteen (18) months DALBERTO was utilized as investigation dictated. DALBERTO supplied past and present intelligence information, made controlled drug purchases, and consented to consensual interceptions of his wire and/or oral communications. This agent was able to make five (5) arrests for drug law violations in Columbia and Luzerne counties as a result of DALBERTO's cooperation. Those five (5) arrests subsequently lead to six (6) additional arrests in Columbia and Luzerne counties. DALBERTO also cooperated with Agent Keith Miller of the U. S. Drug Enforcement Administration, Harrisburg, PA, in an attempt to apprehend DALBERTO's former cocaine source trafficking in Berks and Dauphin counties, however no arrests have been made.

In addition DALBERTO has cooperated with Office of Attorney General, Bureau of Criminal Investigation, Agent Barry Moran, Scranton, PA, in a criminal investigation within Columbia and Luzerne counties. Said investigation is presently ongoing, with arrests expected in the future. Lastly DALBERTO is currently cooperating with Agent Donna J. Slusser of the U. S. Bureau of Alcohol, Tobacco and Firearms, Harrisburg, PA, in an investigation of illegal machine guns, parts and conversions within Columbia county. Said investigation is presently ongoing, with arrest(s) expected shortly.

In conclusion DALBERTO has done everything requested of him by the investigators. All of the investigators jointly state that DALBERTO's information and cooperation has been truthful and exact. This agent is advising your Honor of the extent of DALBERTO's cooperation for whatever consideration your Honor deems appropriate.

Sincerely,

/s/ Robert J. Mattis
Robert J. Mattis #193
Narcotic Agent II

rjm

cc: District Attorney
Adult Probation office
Michael Lynn, Esq.
Defendant
File

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
VS.	:	OF THE 26TH JUDICIAL DISTRICT OF
JOSEPH H. DALBERTO	:	PENNSYLVANIA
OTN C 513863-0	:	COLUMBIA COUNTY
OTN C 267181-5	:	BRANCH CRIMINAL DIVISION
	:	NO. 428 of 1991
	:	NO. 429 of 1991

SENTENCE

BEFORE HONORABLE GAILEY C. KELLER, PRESIDENT JUDGE, in the Courtroom, Columbia County Courthouse, Bloomsburg, Pennsylvania, on Thursday, September 9, 1993.

APPEARANCES:

WILLIAM S. KREISHER, District Attorney for the Commonwealth of Pennsylvania.

MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant.

JOSEPH H. DALBERTO, Called, sworn according to law, and examined by the Court.

BY THE COURT:

Q Mr. Dalberto, have you had an opportunity to read and review the pre-sentence report?

A Yes.

Q Is there anything you wish to state before sentence is imposed?

A Yes, I have been drug free for the past two years, and I have been gainfully employed for the last two years without missing a day's work. And, I realize the mistake I have made and tried to help correct it by cooperating.

Q Is that all you have to say?

A Yes.

MR. LYNN: Your Honor, we have two separate PSI's here. One indicates prior record score of four. I think that is accurate. On the second PSI form is a prior record score of zero indicated. That is the last page of the packet before you.

THE COURT: The one I have just shows a prior record score of four.

MR. LYNN: The four would be correct, I believe.

I note that in the mitigated range, the PSI calls for 27 to 33 months. The Court is aware of the extent of Mr. Dalberto's cooperation per that course, I believe appended to the PSI, described by Mr. Mattis. I have got a list here which I would like you to review just for a moment that indicates the various entities if they are not all apparent on that that Mr. Dalberto has worked along with, that has taken place for a period of approximately two years since the date of his arrest.

We – I have had a meeting with the District Attorney's Office, and he has been contacted by various individuals, all noted on this list. If I can have you review

that. And, given the extent of cooperation, which is impressive and voluminous, our request is that Mr. Dalberto be sentenced in the mitigated range, particularly we are interested, your Honor, in that Mr. Dalberto is gainfully employed, and is a valued employee at his place of business.

We are requesting that the site of his incarceration be in the county so he can continue to be employed and continue programs to engage in the activities which are making for our requests for mitigated range sentence.

My understanding is that given the awareness of the extent of cooperation, the District Attorney's Office does not oppose such a sentence.

THE COURT: Anything further?

MR. LYNN: That is it.

THE COURT: Mr. Kreisher?

MR. KREISHER: Your Honor, the Commonwealth does acknowledge the extent of cooperation and help that the Defendant has done and would request that the Court consider those as mitigating circumstances in imposing sentence.

THE COURT: As I understand it the minimum in the mitigated range is 27 months?

MR. LYNN: Right.

THE COURT: Is there anything further, gentlemen?

MR. KREISHER: No, your Honor.

THE COURT: To number 428 of 1991, count one, we will make the following order:

And Now, to wit, this 9th day of September, 1993 the Defendant is sentenced to pay the costs of prosecution, undergo imprisonment in a state correctional institution for a period of not less than twenty-seven (27) nor more than fifty-four (54) months.

Court two, to number 428, we will make a similar order to run consecutive to that imposed in count one.

Counts three through eight, we will make a similar order to run concurrent.

And to number 429 of 1991 we will make a similar order to run concurrent.

Do you understand, Mr. Dalberto, you have ten days from this date to file a petition for reconsideration of the sentence. You have thirty days from this date to appeal to the Superior Court challenging the lawfulness of your guilty plea as well as the jurisdiction of this plea.

THE DEFENDANT: Yes.

I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the notes taken by me on the above cause, and that this copy is a correct transcript of the same.

CHERI BRENNAN